BRIEF FOR PETITIONERS.

STATE OF THE RECORD.

A complaint (R. 2-29) in the name of Lake-Dearborn Corporation against Ellithorpe charging mismanagement and seeking his ouster as President, Director and owner of corporate stock and other property, and seeking an injunction against Ellithorpe and his wife, was filed September 17, 1942. On October 26, 1942, Ellithorpe filed an Answer, Counterclaim and Demand for Jury Trial (R. 29-54), and Mrs. Ellithorpe filed an Answer. (R. 54) No reply has been filed to either Answer and none to Counterclaim.

A motion in writing (R. 55) was made by Gilbert Ellithorpe under Rule 14, to file third party complaint on behalf of himself, other stockholders and Lake-Dearborn Corporation. The motion with a copy of the third party complaint attached as an Exhibit and incorporated therein, was entered and filed November 17, 1943 (R. 55-67.) Upon an argument made two days later, an order was entered dismissing *with prejudice* said motion and third party complaint made under Rule 14 of Federal Procedure. (R. 68.) This appeal is taken from that dismissal. (R. 69.)

I.

STATEMENT OF FACTS SHOWN BY THE PLEADINGS.

The opening paragraphs and paragraph 23 of the third party complaint, read as follows (R. 56 and 65):

"By the consent and order of this court entered November ...., 1943, Gilbert S. Ellithorpe on behalf of himself and all stockholders as a class, and Lake-Dearborn Corporation, present this third party complaint against third party defendants hereinafter mentioned. *Seeking full remedy for Lake-Dearborn Corporation and its stockholders, against each of the third party defendants for the wrongs hereinafter mentioned,* plaintiff says:

"(1) In the year 1929 stockholder Gilbert S. Ellithorpe purchased for cash a real estate bond, which had been issued by the corporation which was the predecessor to the plaintiff Lake-Dearborn Corporation. That bond was later transferred into shares of stock of the present Lake-Dearborn Corporation, long prior to the date of filing this suit. That stock so remains in the name of Ellithorpe on the records of said corporation. Also Ellithorpe before the filing of this suit had purchased and owns additional shares, which are not yet transferred into his name on said corporate records. Since the year 1929 Ellithorpe has been and remains a bona fide investor in this corporation and property. From time to time prior to date of filing this suit, he had solicited and held and voted proxies for other like investors in said property. At the date of filing of this suit and at the date of injunction order herein on September 28, 1942, Ellithorpe held such proxies for (more than 500 stockholders) more than a majority of the outstanding stock ownership of said corporation. At no time has Ellithorpe received any notice of withdrawal of any of said proxies." * * *

"(23) By reason of Rule 14 of Federal Procedure and the prior pleading, this court has jurisdiction. The third party defendants are liable to original plaintiff Lake-Dearborn Corporation, and also to original defendant Ellithorpe. There exists a similarity of facts and issues between the original complaint and this third party complaint. The matters stated by this third party complaint constitute the same subject matter and arise out of the same transactions and occurrences which are contained in said prior pleading."

As so stated paragraph 1 of the third party complaint sets forth the property rights of Ellithorpe, other stockholders and Lake-Dearborn Corporation, which are sought to be protected by the third party complaint. Under the law of Illinois such a proceeding is an action for recovery by the Lake-Dearborn Corporation. That is a Delaware corporation. *Bingham* v. *Ditzler*, 320 Ill. App. 88 at 91. *Price* v. *Gurney*, 65 S. Ct. 513 at 516, 324 U. S. 100, 105; *Young* v. *Higbee Co.*, 65 S. Ct. 594 at 597, 342 U. S. 204, 209.

Paragraphs 2 to 22 set forth in detail the wrongful civil conspiracy and the specific acts of damage by which the third party defendants have usurped and trespassed upon the property rights sought to be protected by the third party complaint. (R. 45-65.) It is shown by these paragraphs that the third party defendants were employed in May, 1942, as attorneys and counselors-at-law; that they advised and recommended to the directors of Lake-Dearborn Corporation, and to Ellithorpe and wife, that all litigation and claims against its occupant tenants be dismissed, in consideration for an agreement by the ground owners to consummate new ground lease arrangements with Lake-Dearborn Corporation, under specified terms by September 30, 1942; and that after said advice and after the said litigation and claims against occupying tenants had been dismissed, said lawyers were further employed and paid additional legal fees to render legal services, to obtain the consummation of the said deal, between Lake-Dearborn Corporation and the ground owners. During and prior to that employment said lawyers (now third party defendants) received in their charge, confidential information, documents and property rights owned by Lake-Dearborn Corporation and Ellithorpe, which it is charged they have since perverted to their own uses. And to seal that accomplishment and to avoid their fiduciary duties and employment obligations, said lawyers filed the complaint in this cause on September 17, 1942, seeking to oust and

destroy the offices and proxies and property rights of Ellithorpe, and to remove the established management and control of Lake-Dearborn Corporation at that time exercised by Ellithorpe under the proxies then held by him for more than 500 stockholders owning more than a majority of the capital stock of the corporation.

Within the third party complaint, the damages caused by and accruing from said conspiracy and wrongful conduct by said lawyers third party defendants, are set forth in detail. (R. 66.) Appropriate Prayers for Relief (R. 67) conclude the third party complaint, which is verified by movant.

The original complaint filed by said lawyers against Ellithorpe (filed September 17, 1942), which began this action (R. 2-20), starts out as follows:

> "Complaint For Injunction; Restoration of Property; Cancellation of Contract; Damages; Ouster, and other Relief.
>
> "Lake-Dearborn Corporation, a Delaware corporation, Plaintiff in these above entitled procedings, by Frantz & Johnston, its counsel, complains of Gilbert S. Ellithorpe, both individually and as President and Director of Plaintiff Corporation, and of Evelyn Ellithorpe, his wife, as Defendants hereto, and says, to-wit:"

This original complaint filed by said lawyers proceeds to narrate various supposed transactions of Lake-Dearborn Corporation and defendant Ellithorpe, as Stockholder, Director and President of that Corporation (R. 2-18); and seeks relief in great detail (R. 19-20), including a temporary and also a permanent injunction against Ellithorpe, to forbid him to have and to hold any office or proxy or property pertaining to said Corporation, and to prevent him from reporting to or communicating with any stockholders of Lake-Dearborn Corporation.

The Answer thereto, Counterclaim and Demand for Jury Trial by Ellithorpe (R. 29-35), is supported and corroborated by eleven exhibits of corporate documents. (R. 36 to 54.) These documentary exhibits establish in detail the recklessness of the charges made against Ellithorpe by the original complaint, and the fairy tale quality of assertions therein made by said lawyers.

The Answer of Evelyn Ellithorpe (R. 54) shows that she is a housewife; that she has no office or fiduciary relation with Lake-Dearborn Corporation; that she "never attended any meetings of Directors or Officers, and has no personal knowledge about much of the matters charged in the complaint;" and therefore that she denies the complaint as a whole; and asks that the complaint be dismissed as to her.

The substance of all the pleadings is that, after settlement and dismissal by said lawyers of certain litigation with the occupying tenants about July 8, 1942, and during negotiations with agents for ground owners which were carried on by said lawyers third party defendants, who are conducting this suit as they claim for the plaintiff Lake-Dearborn Corporation, and are named as defendants to third party complaint, they found themselves in September, 1942, in disagreement with the President and Director Ellithorpe (who holds proxy for a majority—more than 500—of the stockholders).

That disagreement was about Ellithorpe reporting by mail to said stockholders of Lake-Dearborn Corporation; was as to settlement of litigation with building tenants; and was as to progress of negotiations with the ground owners. Said lawyers opposed making any report to the stockholders. And when he did not accept decisions by said lawyers, as to his duties to the stockholders and as to further conduct of negotiations with the ground owners

from whom the Lake-Dearborn Corporation has a leasehold, said lawyers (who should have withdrawn from their retainer) filed this suit to remove him from offices and to restrain Ellithorpe, asking that the recommendations and decisions of the lawyers should prevail in the management of Lake-Dearborn Corporation, and that the District Court would so order. (R. 19-20.)

The lawyers contend as lawyers and not as parties, by their complaint filed September 17, 1942, that Ellithorpe has brought Lake-Dearborn Corporation near to ruin by his course of management prior to September, 1942; and Ellithorpe by his Answer, his Counterclaim and the third party complaint, contends that the affairs of Lake-Dearborn Corporation at July 10, 1942, were in better trim than for many years; but that said lawyers—defendants to third party complaint—after July 1, 1942, entered upon a course of conduct, including the filing of this suit and entry of temporary injunction to prevent him from exercising his powers and duties as President and Director and proxies from more than a majority of all stockholders; which course of action by said lawyers is an usurpation of control over the corporate affairs, and is the real cause of Lake-Dearborn Corporation plight brought about by them since July 10, 1942.

Background of Litigation.

In the late 1920's, a syndicate was formed (of which Ellithorpe was an original member) which obtained three 99-year ground leases upon the real estate at the North East Corner of Lake and Dearborn Streets at Chicago, with the intention of operating the then existing buildings or erecting a new commercial building thereon for rental revenue purposes. That syndicate was transformed into Dearborn Lake Building Corporation in 1927, which was to

erect a new building. Dearborn Lake Building Corporation borrowed about $1,000,000 through a real estate bond issue and erected about the year 1928 the 10 story building now on that site, which has been occupied as an automobile sales, storage, and garage building. The building has always been tenanted in that manner. (R. 3 ff.)

In 1930 the building corporation defaulted in the payment of its mortgage bond interest and a receiver was appointed for the property in the State Courts. This was followed by the filing of a petition for reorganization in the Federal Court. Thereby the Dearborn Lake Building Corporation was reorganized in the United States District Court at Chicago, under 77B proceedings in 1935. The leases from the ground owners to the Corporation, and the leases of the Corporation to occupying tenants, were modified in that reorganization. Only the reorganized leasehold and building interest was transferred to a new Corporation, organized for that purpose under direction of the United States District Court at Chicago. That new Corporation (Third Party plaintiff herein) is a Delaware Corporation, with Charter dated December 27, 1935. (R. 2.) The modified ground leases which were approved by orders of the United States District Court, provide for a scale of increasing minimum yearly ground rentals reaching $30,000 on and after January 1, 1940, plus real estate taxes, to be paid to the ground fee owners by the Corporation. They do not provide for an equally increasing minimum yearly revenue and real estate taxes under the leases with the occupying tenants. (R. 3 ff.)

The plan of reorganization under said court order in 77B Proceedings, provided that the ground rent arrears were to be cancelled as of December 31, 1934 and the new amended ground and tenant lease rentals were to take effect as of January 1, 1935. Due to the fact that the Trustee under the reorganization proceedings continued

to operate the property until the end of 1935, and further that tax arrears as of December 31, 1934, were not provided for under the plan, the Lake-Dearborn Corporation, when it took over the property from the Trustee on January 1, 1936, was in arrears over $13,000.00 in ground rent when it started in business, without any means whatever of paying off these arrears from the minimum rentals or other income under the tenant leases. Such arrears in ground rent existed January, 1936, when the Lake-Dearborn Corporation started in business in control of the property under the plan of reorganization. From the report of receipts and disbursements as filed by Court Trustee for the entire period when he acted as Trustee from September, 1934 to December 31, 1935, it is shown that the Court Trustee did not pay any rent to the ground owners. He turned over to the Corporation under date of December 31, 1935, all of the funds then in his possession totalling $4,484.71. Of this amount, the Corporation paid over to the ground owners $4,317.46 to apply on 1935 ground rent of $17,500.00. The amended ground leases entered into and provided for under the plan of reorganization approved November, 1935, took effect January 1, 1935, and there was no provision whatever in that plan as approved eleven months after the leases were to take effect, for the payment of the ground rent arrears which had accrued during 1935, and which the Trustee had failed to pay, nor were these arrears ever forgiven by the ground owners. Thus the Corporation started business in arrears in ground rent without any provision to liquidate these arrears, and has been in arrears ever since, with increasing arrears brought about through failure of the plan to provide step-ups in minimum rentals from the occupying tenants to meet the minimum rental step-ups in the ground leases from the rental of $17,500 for 1935 and 1936, $20,000 for 1937, 1938, 1939 and $30,000 for 1940 and thereafter. (R. 3 ff.)

The newly reorganized Lake-Dearborn Corporation therefore was insolvent when brought into being by the United States District Court, and when the turnover was made about January, 1936, and with a scale of increasing future obligations under the ground leases that would bring increasing insolvency, unless more advantageous leases could be made with the occupying and operating tenants. That Court reorganization was unstable and unwise. Counsel for ground fee owners and other persons not parties to the present suit, brought about that instability. (R. 3 ff.)

Beginning January 1, 1940, minimum ground rentals, under the plan of reorganization and the leases as modified and approved by the court were increased from $20,000 to $30,000 per year. No proportionate, or any increase whatever, had been provided for in the minimum guaranteed rentals under the tenant leases. Actually, the total minimum ground rental and real estate taxes payable under the ground leases amounted to over $55,000 per year starting January 1, 1940, whereas the minimum guaranteed rentals under the tenant leases totalled only $49,200, causing further ground rent arrears each year which were not met under the income from the tenant leases. It is important to note that Lake-Dearborn Corporation could not meet its ground rent obligations from the inception of the Corporation in 1935 and following the putting into effect of the plan of reorganization. (R. 9.) This is confirmed by the following statement made in a recent letter sent to the stockholders of the Corporation by General Counsel and Director, Albert Y. Osborn, April 23, 1945:

> "Almost immediately after beginning operations under the plan of reorganization, the Corporation again began to fall into arrears in the payment of ground rent to the fee owners. This condition has become progressively worse due to the fact that the annual gross income from the property is insufficient to enable the Corporation to pay the taxes, ground

rent, insurance premiums and other items which, under the modified 99-year leases, it is obligated to pay."

Management by Ellithorpe, years 1939 to 1942.

Sometime after this reorganization was made under the supervision and with the approval of the United States District Court at Chicago, Ellithorpe sought to protect the investment made by himself and wife in the original syndicate and property, and now represented by the stock in the reorganized Lake-Dearborn Corporation. He obtained proxies from more than a majority of the 800 stockholders, and was elected a Director by the stockholders in March, 1939 and President of the Corporation and Manager by its Board of Directors, in the usual manner, about the month of November, in the year of 1939. The pleadings in this record (R. 21-29, 32-33), and especially the corporate documents which are Exhibits to the Answer and Counterclaim by Ellithorpe (R. 36 to 54), show that he made heroic efforts as a business man, to justify and carry out the reorganization that had been approved by the United States District Court. The increasing ground rentals, real estate taxes, insurance costs and other expenses, and the stationary rentals from occupying tenants, presented a problem that no common sense and no economics can solve. That business problem was created by the United States District Court at Chicago, and the members of the legal profession who advised that Court at the time the reorganization was approved, about the year 1935. (R. 3 ff.) The record shows that Ellithorpe having undertaken this responsibility about November, 1939, as holder of proxies for a substantial plurality of stockholders, and as Director, President and General Manager of the Corporation, and having the faith of a business man, endeavored to carry on the project approved by the United States District Court. He sought to bridge the

financial gap by negotiations with the ground fee owners on one hand, and efforts to enforce leases to the occupying tenants, and to collect rentals due thereunder on the other. Those two forces were economic millstones that worked to grind Ellithorpe and Lake-Dearborn Corporation into dust. The record also shows that the negotiations at times presented hopeful aspects, but never were successful in doing more than getting by momentary crises, until the ground owners' and tenants' proposal of June 30, 1942, was accepted by the Corporation and the Ellithorpes July 1, 1942, under which the ground owners were to consummate a deal to put affairs of the Corporation in a sound condition. (R. 12, 21, 22, 37 ff.)

The record shows that General Counsel Osborn was employed by the Corporation July 27, 1940, to attend each and every directors' meeting and to render advice from time to time concerning the conduct of the general business affairs of the Corporation and the conduct of or carrying forward of any litigation in which Corporation is or may be involved (R. 37), and that Ellithorpe thereafter sought and followed advice of said counsel as to whether the Corporation should: (1) Proceed to enforce the provisions of the plan as confirmed in the 77B proceedings, or (2) file a petition setting forth all pertinent facts and ask for a reopening of the proceedings. (R. 37-39.) The record also shows that the Corporation did file legal proceedings against its tenants claiming rent due and unpaid under the reorganization leases and that said General Counsel Osborn advised that the Corporation was thereby pursuing the course best calculated to obtain for it all the benefits and rights to which it was entitled under the plan of reorganization. (R. 38.)

The record shows that Ellithorpe consulted with legal counsel for the Corporation, and took advice as to whether the business problem could be solved by reopening

the reorganization proceedings in the United States District Court, or by suits of various sorts against various occupying tenants, to modify their leases or to recover damages. Suits against some of the occupying tenants were filed by the Corporation, which were pursued in the Court by reputable lawyers at Chicago, some of whose names are stated in this record. (R. 27, 41, 58)

Demand by ground fee owners.

While these suits were pending and undetermined (R. 66) and while they had the approval and recommendation of said reputable and responsible legal counsel at Chicago, and before they could be tried out to determine whether the needed increase of revenue or unpaid rentals could be obtained by means of such litigation, the ground fee owners in the Spring of 1942 became insistent about payment of ground rentals which had been in arrears since 1935. One or more of the Board of Directors of Lake-Dearborn Corporation, being concerned for personal responsibility in the matter, and not being fully satisfied by previous advice given by the General Counsel of the Corporation as to what should be done with relation to bridging the financial gap, insisted upon employing new special legal counsel for a complete review of the situation. After some inquiry and search with that end in view, Messrs. Myron Frantz, Charles Ralph Johnston, P. Newton Todhunter, members of the legal firm of Frantz and Johnston at Chicago, were employed with approval by Ellithorpe under a written retainer dated May 27, 1942, as shown by this record. They were authorized and agreed by that retainer to conclude negotiations, with the ground owners and tenants or to conduct litigation to remedy the situation. (R. 39 ff.) They were paid in cash substantial fees. (R. 37, 39 and 64.)

The record shows (R. 9) that shortly after June 1, 1942 the ground owners served notice on the Corporation to cure its ground rent defaults within thirty days (or not later than about July 6, 1942) or the ground owners would forfeit all interest of the Corporation under the 99-year ground leases. The record also shows (R. 42) that the tenants (the Holmes Companies) had not paid their June 10, 1942 rent but refused, in the conference held June 30, 1942 at which special counsel Frantz for the Corporation was present, to pay said rent and stated that they would breach their leases and vacate the premises unless the following things were done at once: that all pending litigation against the Holmes Companies initiated by the Corporation would be settled and disposed of, and satisfactory releases given by Mr. and Mrs. G. S. Ellithorpe with reference to any claims which they or either of them may have or claim to have against Glenn E. Holmes and/or Clifton H. Stowers; that they be given a new lease to and including December 31, 1944, providing for a yearly rental of $40,000; that the Holmes Companies be given permission to do war work on the leased premises. The agents for the ground owners stated at the said conference: that their position was such that they must insist that such provision as will be necessary be made to ensure the continued occupation of the premises of the Corporation by the tenant companies under a lease to run until December 31, 1944, providing sufficient guaranteed minimum rental to ensure the payment of taxes, insurance and necessary repairs to the premises plus some reasonable return, in view of all the circumstances, to the ground owners in the way of ground rent; that they felt that in order that this be done it would be necessary that said minimum rental be not less than $40,000.00; that said representatives of the ground owners stated their willingness to enter into a rent assignment period agreement similar to the one entered into in March 1942, and

to run for the next ninety days, during which time a deal would be negotiated between the Corporation and the ground owners with reference to the property and the ground leases. In the said conference the agents for the ground owners further stated (R. 42-43) that for and in consideration of the relief to be granted to the Holmes Companies, by Lake-Dearborn Corporation, and in further consideration of the turning over of the $3,000.00 to be received by the Corporation from the Holmes Companies, for application to real estate taxes, the ground owners, through their agents, would negotiate and consummate during the next ninety days, with representatives of Lake-Dearborn Corporation, a revised ground lease or some other provision or agreements which would place the affairs of the Lake-Dearborn Corporation upon a sound basis and dispose of the question of ground lease arrears. The said proposal and demands of the tenants and ground owners was reported to the directors of the Corporation by General Counsel Osborn and Counsel Myron Frantz at a special meeting of the Directors July 1, 1942. Said General Counsel Osborn and members of the firm of Frantz and Johnston (who lately filed the pending litigation against Ellithorpe), including Myron Frantz, advised the directors present at the said meeting, and the Ellithorpes, to accept the proposal at once. (R. 42ff)

Advice given by Respondents.

Shortly before and after July 1st, 1942, these special legal counsel advised Ellithorpe and the Board of Directors of Lake-Dearborn Corporation to settle and dismiss all the pending litigation against the occupying tenants upon terms stated in the recommendation. (R. 42ff)

By the recommendation made by counsel Osborn and Frantz and Johnston July 1, 1942, Ellithorpe and Board of Directors, and Mrs. Ellithorpe as a stockholder, were

given to understand that if this was done, the special legal counsel, and the General Counsel for the Corporation, had arranged a definite settlement with the ground fee owners, which would cancel all ground rent arrears and prevent any further arrears under the ground leases, and would place affairs of Corporation in a sound condition and enable Lake-Dearborn Corporation to continue in charge of the properties, and would safeguard the interests of the stockholders of Lake-Dearborn Corporation. (R. 42ff)

Only upon that written recommendation and assurance shown by Exhibits to pleading in this record, Mr. and Mrs. Ellithorpe, as stockholders, and Lake-Dearborn Corporation, by its officers, including Ellithorpe as President, signed and executed the necessary papers, for release and dismissal of all claims and litigations pending and alive at that date against the occupying tenants. (R. 58) These documents with the consent of counsel in those litigations were delivered to the new special counsel and General Counsel of the Lake-Dearborn Corporation (now Third Party Respondents herein), for the purpose of executing their assurances and recommendation, which had been given in writing to Mrs. Ellithorpe, to the Corporation, and to Ellithorpe. Said special legal counsel and the General Counsel for the Corporation delivered all those papers and released all the claims and litigation existing on July 8, 1942, and thereby erased all claim and right for the Corporation to recover from the occupying tenants anything other than future rents under the terms of their new leases to run to December 31, 1944. (R. 42ff)

There is no doubt whatever from the facts contained in the original complaint and the Third Party Complaint as set out in the Record before the Circuit Court of Appeals, that the real issues all arise from matters that transpired after June 30, 1942 when the proposal of that

date made by the tenants and the ground owners was presented to the Directors of the Corporation and to Ellithorpe. The acceptance of that proposal by all parties and the complete compliance with its terms by the Corporation, Mrs. Ellithorpe and Ellithorpe, completely negatives any complaint raised by the Corporation as to matters that transpired prior to that date. The matters which transpired after June 30, 1942 all revolve around whether or not counsel for the Corporation were telling the truth to the directors and the Ellithorpes as to the deal to be made with the ground owners by September 30, 1942 and as to the liability of the said counsel under any representations or misrepresentations as to that deal. It must be borne in mind that there was no requirement under that proposal accepted and acted upon by the corporation and the Ellithorpes, that the Ellithorpes must surrender all their stock interests in the Corporation, and that Ellithorpe must resign as President and Director and surrender all of his proxies before the ground owners would make the deal by September 30, 1942 or any other time. No one ever agreed to do these things in order to make the deal with the ground owners. That deal as reported to the stockholders by letter of September 8, 1942, was to be made (R. 22) strictly pursuant to the corporate record dated July 1st, 1942, which was prepared by the Respondents (R. 41-48).

Misconduct by Third Party Respondents.

However, the ground owners' part of the proposal of June 30 1942, so recommended and promised by the special and General Legal Counsel of Lake-Dearborn Corporation (Third Party Respondents herein), was not carried out. Instead of accomplishing a modification of the rentals and leases with the ground fee owners sufficient to enable Lake-Dearborn Corporation to survive and continue as a solvent

business, the new legal counsel, and later the General Counsel for Lake-Dearborn Corporation, who had been employed and paid to consummate the arrangements with ground owners (R. 39-41ff, 50, 64), in August 1942 turned upon this business man Ellithorpe, and demanded that he resign as President and Director, and proxy holder for Lake-Dearborn Corporation, and further that he and his wife surrender all stock and all interest whatever in Lake-Dearborn Corporation. (R. 2ff)

Ellithorpe refused that demand. He had asked early in July 1942 that the situation be presented to the stockholders by a letter. The legal counsel had refused to inform the stockholders. [R. 61 (13), (14).] They pretended there was not time to do that. (R. 47-48.) Nine days before they made this new demand upon Ellithorpe and his wife, Ellithorpe did notify the stockholders of the proposal of June 30 1942 made by the ground owners and tenants and accepted by Corporation July 1 1942, as shown by this record. That act angered the legal counsel, and without consulting Ellithorpe, who was Corporation Manager, President and Chairman of Board of Directors, they called a special meeting of the Board of Directors by telegram to Ellithorpe and some of the Directors. Only part of the Directors attended. At that meeting held on the morning of September 17 1942, Ellithorpe offered to resign as President and Director of Lake-Dearborn Corporation, inasmuch as counsel had stated at that meeting that the ground owners would not consummate any deal with Corporation so long as Ellithorpe remained in control of Corporation. The tendered resignation was refused unless Ellithorpe would also surrender all of his 500 proxies together with all corporate stock and interest of himself and his wife pertaining to Lake-Dearborn Corporation. This latter demand Ellithorpe refused to comply with, and Ellithorpe's resignation was again refused. Thereupon the meeting was recessed until

the afternoon. Before the recess was over, the original complaint in this suit was filed about 2:00 o'clock that day in the United States District Court at Chicago, to oust Ellithorpe from his offices of President and Director and from any interest in or control of affairs of Corporation; and a news release appeared in one of the newspapers at Chicago, making statements about "fraudulent acts" of Ellithorpe, and gave considerable space to the matter. Just before the morning session of the Board of Directors was recessed, Ellithorpe handed to the Treasurer of the Corporation, bank cashier checks which with bank account of Lake-Dearborn Corporation made treasury cash then on hand, $4125.00. (R. 65.) Ellithorpe did not return to the afternoon session of that meeting of the Board of Directors. The record does not show what was done that afternoon or later by the Board of Directors of the Lake-Dearborn Corporation.

At the morning session of the Board of Directors which Ellithorpe attended, the General and Special Counsel for the Corporation, obtained a resolution signed by three Directors, one of whom was Osborn, the General Counsel for the Corporation. That resolution purported to vest Ozborn and Frantz and Johnston, with omnibus authority to institute new suits against all the occupying tenants, and also against the ground fee owners, and also against Ellithorpe and wife. (R. 53.) The suit filed that afternoon by said legal counsel against Ellithorpe and wife, (the suit in which this Third Party Complaint is presented) is the only litigation that has been filed under that resolution, so far as Ellithorpe and his counsel are able to ascertain.

The record shows that the money paid out (prior to September 1942 when present suit was begun) from the Treasury of Lake-Dearborn Corporation for legal services in relation to litigation, was paid under the direction and

with the approval of legal counsel for the Corporation. The checks were signed or countersigned by the General Counsel of the Corporation by him as Treasurer, and many of them were paid to and endorsed by either the General or the Special Legal Counsel for the Corporation, who are Third Party Respondents in this case. This fact reduces to an absurdity the attack made by the complaint against Ellithorpe for misuse of funds of the Corporation. That charge in the complaint sworn to and filed by said legal counsel is the main basis, upon which they obtained from the United States District Judge the injunction against Ellithorpe. If there was a limitation of $1,000 upon spending of corporate funds within any one year under the reorganization plan as has been contended by counsel for plaintiff, it was the positive duty of said legal counsel to have so advised in writing the Board of Directors and Ellithorpe. The record shows that on the contrary they were willing to take unlimited sums as fees, so long as Ellithorpe was willing to trust their advice. When he declined to go further without report to the stockholders and confirmation of action by the directors, these legal counsel decided to take over the corporate affairs and stop Ellithorpe by injunction. This they have done. If these lawyers erred in the use, taking, demanding and receiving and keeping corporate monies contrary to some order or provision by Court, or by Corporation by-law, they were guilty of wrongful legal advice to the corporate officers, and conduct the equivalent of the embezzlement of corporate funds. The record shows that these legal counsel who are Third Party Respondents, themselves have done and received the benefits of all the class of acts with relation to corporation affairs which they accuse Ellithorpe of wishing to do. By their own sworn complaint such acts by said counsel were *illegal* misconduct. The Third Party Respondents convict themselves of the worse conduct of having given false advice

and of having received monies for such false advice, and thereafter of having obtained an injunction against Ellithorpe for correctly advising stockholders of the situation. By such conduct by these lawyers, the management and control of the Corporation ever since September 17, 1942, has been taken away from the stockholders, and from their proxy holder and from the President of the Corporation, (no proxies ever cancelled and no annual meetings) and has been turned over to said Third Party Respondent lawyers by means of the injunction against Ellithorpe, who remain in charge solely and only by force of said injunction order issued by the United States District Court. (R. 56.)

Respondents place emphasis upon the fact that Third Party Complaint was not presented until about a year after the answer and counterclaim were filed. The fact that no reply has ever been made to the answer and counterclaim, ought to be sufficient response to such suggestion. The real reason for said interval of time however, is shown by the Third Party Complaint. Neither Ellithorpe nor his counsel knew that the lawyers who are made Third Party Respondents had failed to keep their promises to the Corporation, and to the United States District Court until September 20 1943. If Ellithorpe were enjoined, they led the Court to believe they would secure a satisfactory arrangement with the ground fee owners. As shown by the terms of their employment this was the main purpose of bringing the Special Legal Counsel into the situation in the Spring of 1942, and the basic reason why said legal counsel insisted to the directors and to the Court in September 1942, that they must have authority to enjoin, and must enjoin Ellithorpe from any further acts of control in the situation.

The initial complaint in this suit was prepared by Third Party defendants and filed September 17, 1942, against

Ellithorpe "both individually and as President and Director of Plaintiff Corporation." (R. 2.) That misconduct by Third Party defendants is emphasized at Paragraph 11 of the Third Party Complaint as follows:

> "(11) For many months prior to the filing of the present suit, said special and general legal counsel for the corporation (who personally have signed original complaint in this suit and the affidavit thereto) were in fiduciary relationship by means of frequent conferences with Ellithorpe in and about the affairs of Lake-Dearborn Corporation, and therefrom acquired knowledge of his conduct personally and as an officer and director and manager of corporate affairs. The filing of complaint in this suit by said fiduciary legal counsel is a complete breach of that trust and confidence, and is an unconscionable act in which all of said legal counsel participated in violation of their respective duties under Canon 6 and Canon 37 of the Code of Professional Ethics, and contrary to their primary duties in equity and good conscience to Ellithorpe, Lake-Dearborn Corporation and to its stockholders." (R. 61.)

Frantz & Johnston's employment July 10 1942 (R. 50) under which they were paid $1500 in addition to the previous amount mentioned of $1500 provided:

> "Frantz & Johnston will expend such time and render such services on behalf of Lake-Dearborn Corporation as shall be requested by the Directors and/or general counsel for the Corporation in connection with the negotiations about to be carried on with the ground owners and/or their agents, until such time as said negotiations shall ripen into an agreement acceptable to all parties, or shall be definately abandoned for failure of such agreement. * * * and that in the event such negotiations shall be abandoned for failure to reach an agreement said firm of Frantz & Johnston will at the request of the Directors and/or general counsel for the Corporation initiate such court proceedings as, in the judgment of

said directors and/or said general counsel, shall be required to protect the interests of the Corporation in relation to the ground owners and/or their agents, and said firm of Frantz & Johnston will carry forward to conclusion such proceedings upon a mutually agreeable contingent fee basis to be agreed upon at that time without further payment at such time on account of fees."

Osborn, in his fiduciary duty as general counsel, and particularly due to his agreements continuing his employment of July 27 1940 in force (R. 37), and further payments and employment subsequent to that time, out of which he received fees of more than $5,000, was obligated to insist that Frantz & Johnston initiate and conclude such proceedings against the ground owners and their agents designed to fully protect the interests of the Corporation against the failure of the ground owners to make the deal which their agents had agreed to make, or to prevent the forefeiture of the leases and building pending the final determination of the suit filed against Ellithorpe. As far as known, and a letter sent by directors to stockholders April 23 1945, does not indicate to the contrary, the Corporation has taken no legal steps against the ground owners of any kind, nor made any further attempts to consummate the deal with ground owners under the proposal of June 30 1942. If counsel for Corporation contend the resolution they caused the directors to sign September 17 1942 is valid as to the filing of suit against Ellithorpe, it is also binding upon them to file suit against all of the ground fee owners and tenants named therein. (R. 53.) The occasion for filing the suit against the respondents, most certainly arose when the ground owners failed to consummate any deal; but directly to the contrary, served notice of forfeiture September 1 1944.

PROPOSITIONS OF LAW RELIED ON BY APPELLANTS.

(1) The tendered third party complaint states a substantial cause of action against the defendants therein named, arising out of the same occurrences and transactions and subject matter mentioned by prior pleadings. That complaint is made part of the motion (R. 55-67) pursuant to Rule 14 of Federal Civil Procedure, filed and entered November 17, 1943, for leave to serve and secure order for summons and answer.

Falcone v. City of New York, 2 F.R.D. 87.

Boesenberg v. Chicago Title & Trust Co., 128 Fed. (2d) 245 at 246.

Supreme Tribe of Ben Hur v. Cauble, 255 U.S. 356 at 363.

Guilfoil v. *Arthur*, 158 Ill. 600 at 605.

Bingham v. *Ditzler*, 320 Ill. App. 88 at 91.

39 Amer. Jurisprudence 917, Parties Section 44ff.

The wrongful conduct and the liability of third party defendants, so established by the third party complaint, are not anywise excused by reason that said defendants are fiduciaries and lawyers. (R. 55 to 67.)

Crim v. *Lumberman's Mutual Casualty Company*, 26 F. S. 715.

In Re American Fuel & Power Co., 122 Fed. (2d) 223 at 229.

Dewey and others v. *Johnston and others*, 25 F. S. 1021 at 1023.

Maclaskey v. *Mecartney*, 58 N. E. (2d) 630 ff., 324 Ill. App. 498.

(2) The issues tendered by the third party complaint, in substantial part are complementary to the issues presented by previous pleadings; and these additional parties are necessary for an adequate determination and means for satisfaction, of the personal and property rights which are before the court upon the prior pleadings.

The third party complaint and the defendants thereto are necessary and indispensable to complete disposition of the whole case which is stated only in part by complaint, answers and counterclaim.

The third party complaint, the answers and the counterclaim to original complaint, each in its own way shows that the third party defendant lawyers, by their conduct are the cause of the insolvency of the Lake-Dearborn Corporation, which they charge has occurred. (R. 55-67, 29-54, 21-ff.)

United States v. *Amer. Surety Co.*, 25 F. S. 700 at 701.

Oglesby v. *Springfield Marine Bank*, 385 Ill. 414 at 423, 52 N. E. (2d) 1000.

Corica v. *Ragen*, 140 F. 2d 496 at 499.

Arizona Lead Mines, Inc. v. *Sullivan Mining Co.*, 3 F. R. D. 135 at 139.

(3) The refusal by District Court to order leave to file third party complaint, as of right under Rule 14 of Civil Procedure providing therefor, is a denial of primary personal and property rights under the Constitution by refusal of right to plead vested in movant, and thereby a complete denial of hearing and protection by court order. (R. 68.)

Cities Service Oil Co. v. *Dunlap*, 308 U. S. 208 at 212.

Greenleaf v. *Huntingdon, etc., Coal Co.*, 3 F. R. D. 24.

Supreme Tribe of Ben Hur v. *Cauble*, 255 U. S. 356 at 363.

This third party proceeding is ancillary to the action by original complaint and so inseparable that it requires no separate ground of jurisdiction. (R. 55-67.)

Metzger v. Breeze Corp., Inc., 37 F.S. 639, 695.

Williams v. Keyes, (C.C.A. 5) 125 Fed. (2d) 208.

People v. Maryland Casualty Co., 2 F.R.D. 241.

Sklar v. *Hayes*, 1 F. R. D. 594.

Reed v. *Hickey*, 2 F. R. D. 92.

U. S. v. *Pryor*, 2 F. R. D. 382.

Bingham v. *Ditzler*, 320 Ill. App. 88 at 91.

Balcoff v. *Teegarden*, 36 F. S. 224.

The Hudson, 15 Fed. 162 at 165.

III.

ARGUMENT FOR APPELLANTS.

1) The tendered third party complaint (Tr. 56-67) states a substantial cause of action against the defendants therein named, arising out of the same occurrences and transactions and subject matter mentioned by prior pleadings. (R. 65) That complaint is made part of the motion (R. 55-56) pursuant to Rule 14 of Federal Civil Procedure, filed and entered November 17, 1943 for leave to file pleadings and secure order for summons and answer.

The Court will remember that the third party complaint unifies itself with the prior pleadings in the manner provided for by the Rules. The Court will recall the following language is part of the third party complaint:

"(23) By reason of Rule 14 of Federal Procedure and the prior pleading, this court has jurisdiction. The third party defendants are liable to original plaintiff Lake-Dearborn Corporation, and also to original defendant Ellithorpe. There exists a similarity of facts and issues between the original complaint and this third party complaint. The matters stated by this third party complaint constitute the same subject matter and arise out of the same transactions and occurrences which are contained in said prior pleading." (R. 65.)

If the complaint which began this action on September 17, 1942, states a litigable claim (Tr. 2-20), it is equally true that the third party complaint states a litigable claim. If either is stricken the entire litigation must fail. Both are indispensable to a just and fair hearing.

The wrongful conduct and the liability of third party defendants, so established by the third party complaint, are not anywise excused by reason that they are lawyers. (R. 55 to 67.)

For purposes of litigation, lawyers and fiduciaries are not different from other citizens. On the contrary, they are more subject to court action, by reason of their professional conduct, than are other citizens. The third party complaint in this case shows that the lawyers as fiduciaries who are third party defendants, did fail to perform their professional duties in conducting negotiations, and the handling of corporate matters specifically given them in charge, for the promise to do which they had received and were paid in advance the agreed more than adequate compensation. In the case of *Crim* v. *Lumberman's Mutual Casualty Company*, 26 F. S. 715 at 716, and other decisions, our Courts have ruled that lawyers and other fiduciaries are proper defendants to third party complaint and other pleadings.

2) The issues tendered by the third party complaint, in substantial part are complementary to the issues presented by previous pleadings; and these additional parties are necessary for an adequate determination and means for satisfaction, of the personal and property rights which are before the court upon the prior pleadings.

The third party complaint and the defendants thereto are necessary and indispensable to complete disposition of the whole case which is stated only in part by complaint, answers and counterclaim.

The third party complaint, the answers and the counterclaim to original complaint, each in its own way shows that the third party defendant lawyers, by their conduct are the cause of the insolvency of the Lake-Dearborn Corporation, which they charge has occurred. (R. 55-67, 2-20, 29-54.)

As shown above, the third party complaint at paragraph 23, carefully identifies the subject matter and issues tendered by the third party complaint, as part of the same transactions and occurrences which are dealt with by the prior pleadings. For the Court to hear a case upon the prior pleadings, and to omit the third party complaint, is to try one affirmative side of a lawsuit, and omit the other affirmative side of the same subject matter. To do so would make the Court a one-way institution, wherein the first plaintiff to arrive at court is given an overwhelming advantage. That is contrary to common sense, common justice, and the frequent rulings of this and other courts.

Corica v. *Ragen*, 104 F. 2d 496 at 499. The Court rules:

> "A court of equity must exercise its discretion in such manner as to safeguard the interests of both parties, and, in certain circumstances, such as those in the instant case, it is an abuse of judicial discretion to issue an injunction which permits one party to

obtain an advantage by acting, while the hands of the adverse party are tied by the writ."

In *United States* v. *American Surety Co. of New York,* 25 F. S. 700 at 701, the Court say:

> "The new rules of procedure are designed to enable the disposition of a whole controversy such as this at one time in one action, provided all parties can be brought before the Court and the matter decided without prejudicing the rights of any of the parties."

In *Arizona Lead Mines, Inc.* v. *Sullivan Mining Co.,* 3 F. R. D. 135, the court says:

> "It is a familiar maxim that 'a court of equity ought to do justice completely and not by halves,' and to this end, having properly acquired jurisdiction of a cause for any purpose, it should dispose of the entire controversy and its incidents *and not leave any part of it unsettled.*"

3) The refusal by District Court to order leave to file third party complaint, as of right under Rule 14 of Civil Procedure providing therefor, is a denial of primary personal and property rights under the Constitution by refusal of right to plead vested in movant, and thereby a complete denial of hearing and protection by court order.

This third party proceeding is ancillary to the action by original complaint and so inseparable that it requires no separate ground of jurisdiction. (R. 55-67.)

Without pleadings there cannot be proof. Without affirmative pleading, there cannot be any satisfactory recovery. Without proper defendants to that affirmative pleading, the recovery, if obtained, will not be against the substantial and guilty parties who perpetrated the wrong. Without the third party complaint, the successful defense of this lawsuit would be a very costly and pyrrhic victory. No adequate results for the corporation, nor for Ellithorpe can

be obtained from this litigation, without the third party complaint to bring forward proper satisfaction for the matters stated by the answer and counterclaim by Ellithorpe.

Balcoff v. *Teegarden*, 36 F. S. 224 at 225.

Dismissal with prejudice is the same as an adjudication upon the merits.

Hargis v. *Robinson*, 79 Pac. 119, 121, 70 Kan. 189.
Union Indemnity Co. v. *Benton County Lumber Co.*, 18 S.W. 2d 327, 330, 179 Ark. 752.
Fenton v. *Thompson*, 176 S. W. 2d 456, 460; 352 Mo. 199.
Boaz v. *Mutual Life Ins. Co. of New York*, 53 F. S. 97 at 102.
Rule 41(b) of Federal Civil procedure.

This Court grants writ of certiorari to review a Federal Question of substance which has not previously been determined by this Court. *Brooklyn Savings Bank* v. *O'Neil*, 65 S. Ct. 895 at 906.

(Italics are used herein for emphasis.)

CONCLUSION.

Appellants ask that the orders entered by the District Court on November 19, 1943, and entered by the United States Court of Appeals for the Seventh Circuit entered June 5, 1945, shall be reversed, and that an order be entered for process and answer pursuant to the third party complaint and Rule 14, and other applicable rules and law.

Respectfully submitted,

WEIGHTSTILL WOODS,
Attorney for Petitioners.

(26)

SEP 11 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1945

FILE NO. 260

GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,

Third-Party Plaintiffs and Petitioners,

vs.

ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),

Third-Party Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Honorable Michael L. Igoe, District Judge.

BRIEF OF LAKE-DEARBORN CORPORATION, AN ALLEGED "PETITIONER", IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI HEREIN FILED IN ITS NAME, WITHOUT AUTHORITY.

CHARLES RALPH JOHNSTON
Counsel for Lake-Dearborn Corporation
11 South La Salle Street—835
Chicago 3, Illinois

CHARLES RALPH JOHNSTON and
Leo J. Hassenauer
Of Counsel

MC CORMICK AND HENDERSON, INC., CHICAGO

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1945

FILE NO. 260

GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,
Third-Party Plaintiffs and Petitioners,

vs.

ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),
Third-Party Defendants and Respondents.

On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

Honorable Michael L. Igoe, District Judge.

BRIEF OF LAKE-DEARBORN CORPORATION, AN ALLEGED "PETITIONER", IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI HEREIN FILED IN ITS NAME, WITHOUT AUTHORITY.

TRUE STATUS HEREIN OF CERTAIN ALLEGED PARTIES "PETITIONER" AND "RESPONDENT", AND GROUNDS FOR MOTIONS TO STRIKE OR DENY PETITION FOR LACK OF PROPER PARTIES PETITIONER AND RESPONDENT, RESPECTIVELY, AND FOR LACK OF PROPER SERVICE UPON SAID ALLEGED RESPONDENTS.

The attorney who prepared and filed this purported application for certiorari, Weightstill Woods (counsel for Gilbert Ellithorpe, *one* of the *two* alleged "Petitioners" herein), has misconceived the proper mode of use of the certiorari remedy, and particularly the permissible scope of his action in assuming to represent both of said alleged "Petitioners" herein, without any authority so to do from

one of them, and to designate as "Respondents" hereto certain other persons who were not, and now are not, parties to this case in either court below, and his failing to properly serve said alleged "Respondents", all in connection with his efforts to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit dismissing the appeal taken by Ellithorpe from an order of the District Court for the Northern District of Illinois, denying a motion made by Ellithorpe to implead said alleged "Respondents" as third-party defendants.

This counsel, Weightstill Woods, here erroneously assumes that the remedy of certiorari, without authority from and over the express objection of said Corporation, entitles him to herein act as legal counsel for and represent Lake-Dearborn Corporation, whom he has labelled a "Petitioner" herein, in that capacity; and further erroneously assumes that this remedy entitles him to designate as and make "Respondents" hereto, four persons, namely, Albert Y. Osborn, Myron Frantz, Charles Ralph Johnston and P. Newton Todhunter, when none of said persons was a party to, nor was served with process, nor entered any appearance, nor filed any pleadings or briefs, nor intervened or participated in any of the proceedings, nor obtained any relief, in this case in either the Appeals Court or District Court below. Some of these last above named four persons at one time were attorneys of record in the District Court for Lake-Dearborn Corporation, and did appear *in the capacity of attorneys* as counsel for said Corporation in said Court; but none of these persons at any time appeared or took part, personally and as parties, in either court below. And in said Appeals Court *only* said Charles Ralph Johnston appeared as counsel for Lake-Dearborn Corporation, as his said law firm theretofore had been dissolved through loss of four out of six of its personnel due to the war.

It is a fact that inadvertently an attorney having an office in the same suite as that of Charles Ralph Johnston, the undersigned counsel for the Plaintiff—Appellee below, Lake-Dearborn Corporation, during the illness and absence from his office of said Johnston, failed to notice or object to the form of one or two notices in connection with this application for certiorari, at the time they were served, on which notices said last above named four persons were labelled as "Respondents". But both orally on July 25, and by two separate letters, on August 13 and August 28, thus allowing ample time within which to amend this application before the expiration of the three months allowed for filing the same, said counsel for Gilbert Ellithorpe was notified by Charles Ralph Johnston of the true fact which he already well knew, that said Johnston had no authority to represent and, in fact, did not represent, any of said so-called "Respondents" in either court below, or in connection with this certiorari application; but was counsel only for Lake-Dearborn Corporation. On each of the aforesaid dates, both orally and by said letters, said Woods was informed by Johnston that Johnston repudiated any alleged service of the above mentioned notices in which said persons were labelled as "Respondents" to this certiorari application. And Woods' attention also was then called to the fact that none of said persons ever was, or ever had been, a party to this case in either court below.

Said Woods replied that if Lake-Dearborn Corporation cared to oppose this application, it might do so. It hereby does.

As mentioned above, some of these four persons were counsel for Lake-Dearborn Corporation in the District Court, but appeared therein only in the capacity of *attorneys*, and *not* personally and *as parties* to this case. Leave to make these four persons third-party defendants

to this case was denied by the District Court, as Woods also knew.

The original suit out of which this purported certiorari application arises was filed on September 17, 1942, in the United States District Court for the Northern District of Illinois, Eastern Division, and then was, and now is, entitled as follows:

"LAKE-DEARBORN CORPORATION,
a Delaware Corporation,
Plaintiff

vs.

"GILBERT S. ELLITHORPE and EVELYN ELLITHORPE, his wife,
Defendants.

} Gen. No. 4681"

The appeal in this case to the United States Circuit Court of Appeals for the Seventh Circuit, was there docketed on March 25, 1944, by said Weightstill Woods, as counsel for Gilbert Ellithorpe, as the sole Appellant therein, and then was, and now is, correctly entitled in said Appeals Court, as follows:

"No. 8551

"LAKE-DEARBORN CORPORATION, a Delaware Corporation,
Plaintiff-Appellee

vs.

"GILBERT S. ELLITHORPE,
Defendant-Appellant

} Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division."

The printed Transcript of Record in said appeal (copies of which have been filed in this Court), which thereafter was prepared and filed in said Appeals Court by said Woods, as attorney for said Gilbert Ellithorpe, as the sole Appellant therein, also was correctly entitled in the same manner as was said appeal when it was docketed, as is shown immediately above.

A so-called "Brief For Appellants" filed in said appeal, by said Woods, as attorney for said sole Appellant therein, Gilbert Ellithorpe, was entitled as follows:

"No. 8551

"LAKE-DEARBORN CORPORATION, a corporation,

Plaintiff-Appellee,

vs.

"GILBERT S. ELLITHORPE Movant for Third Party Complaint,

Defendants-Appellants.

"Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division."

Thereafter, a so-called "Appellants' Reply Brief was filed in said appeal by said Weightstill Woods, as attorney for said sole Appellant therein, Gilbert Ellithorpe, in which *for the first tme,* and *without asking or obtaining leave of said Appeals Court* so to do, the title of said appeal was altered and incorrectly stated upon said Brief, as follows:

"No. 8551

"LAKE-DEARBORN CORPORATION, a corporation,

Plaintiff,

"*vs.*

"GILBERT S. ELLITHORPE and EVELYN ELLITHORPE,

Defendants.

"GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION, (R. 56),

Third-Party Plaintiffs and Appellants,

"*vs.*

"ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the firm of FRANTZ AND JOHNSTON, (R. 67),

Third-Party Defendants and Appellees.

"Third Party Complaint (R. 56 ff) Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

"Honorable Michael L. Igoe, Trial Judge."

Said so-called "Appellants' Reply Brief" was prepared by said Weightstill Woods and filed in said Appeals Court

on June 4, 1945, and was served upon Charles Ralph Johnston, as counsel for said Lake-Dearborn Corporation (the *real* and *sole Appellee* therein), on June 5, 1945, the same day on which the hearing and argument of said appeal was had before said Appeals Court. Consequently, there was no time to prepare, serve and present a motion to strike or to compel said Gilbert S. Ellithorpe to correct said title upon his said "Appellants' Reply Brief"; and, as said appeal was finally dismissed on that same day, no good reason then appeared why said real and sole Appellee, Lake-Dearborn Corporation, should move to strike or compel the correction of said title, as such changes are surplusage.

This purported certiorari application, as the Clerk of this Court has informed Charles Ralph Johnston, the counsel who files this opposing Brief herein, was docketed in this Court, on July 25, 1945, by said Weightstill Woods, *herein assuming to be and act as attorney for both of said alleged Petitioners herein* (but who is not, and never has been, attorney for Lake-Dearborn Corporation), under the following number and title:

"No. 260

"GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,
Third-Party Plaintiffs and Petitioners,

vs.

"ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),
Third-Party Defendants and Respondents."

Said purported application for certiorari is neither entitled, nor is it made, by either the sole Appellant, or the sole Appellee, in said appeal to said Appeals Court, against

the other party in said Court; but, said *application for certiorari purportedly has been made by BOTH of said opposing parties to said appeal* (that is, by both said Apellant and Appellee therein), against four other persons, none of whom was or is a party to, or ever appeared or participated in said appeal.

Said purported Petition For Writ Of Certiorari thereafter was filed in this Court on July 25, 1945, by said Weightstill Woods (who was and is attorney of record in said District and Appeals Courts for said Gilbert S. Ellithorpe, but who is not, and never has been, attorney for Lake-Dearborn Corporation), and who designates himself upon said Petition as "Counsel of Record for Petitioners." This purported Petition bears the following erroneous title, which was and is wholly unauthorized by this movant, Lake-Dearborn Corporation:

"LAKE-DEARBORN CORPORATION, a corporation,

Plaintiff,

"*vs.*

"GILBERT S. ELLITHORPE and EVELYN ELLITHORPE,

Defendants.

"GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,

Third-Party Plaintiffs and Petitioners,

"*vs.*

"ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),

Third-Party Defendants and Respondents."

"On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for The Seventh Circuit.

"Honorable Michael L. Igoe, District Judge."

Said title appearing upon said purported Petition, as is shown immediately above, wholly departs from the title appearing upon this certiorari application as the same

appeared when this application was docketed in this Court, as also is hereinabove shown, by adding thereto, immediately preceding said title, the names of said alleged "Petitioners" herein, as they appeared both upon said suit as filed in said District Court and upon this certiorari application as docketed in this Court. That is, said counsel for said alleged "Petitioners" herein has added to, and preceded said title of this certiorari application with, the title of said suit as it appeared in said District Court, which had been omitted from the title upon this certiorari application when docketed in this Court, as follows:

"LAKE-DEARBORN CORPORATION, a corporation,
Plaintiff,
"*vs.*
"GILBERT S. ELLITHORPE and EVELYN ELLITHORPE,
Defendants.

so that said title upon said Petition, with said above title added thereto, now reads:

"LAKE-DEARBORN CORPORATION, a corporation,
Plaintiff,
"*vs.*
"GILBERT S. ELLITHORPE and EVELYN ELLITHORPE,
Defendants

"GILBERT S. ELLITHORPE, on behalf of himself and all stockholders as a class, and LAKE-DEARBORN CORPORATION,
Third-Party Plaintiffs and Petitioners,
"*vs.*
"ALBERT Y. OSBORN, MYRON FRANTZ, CHARLES RALPH JOHNSTON, P. NEWTON TODHUNTER, and the Firm of FRANTZ AND JOHNSTON, (R. 55 and 67),
Third-Party Defendants and Respondents."

"On Petition for Writ of Certiorari to the United States Circuit Court of Appeals for The Seventh Circuit.

"Honorable Michael L. Igoe, District Judge."

The undersigned counsel, Charles Ralph Johnston, who was and is the sole attorney of record for said Lake-Dearborn Corporation (an alleged "Petitioner" hereinabove named) in said United States Circuit Court of Appeals for the Seventh Circuit, has been served with a printed Transcript of Record enclosed in the same cover used upon and bearing the same title as that of said appeal in said Appeals Court. But no completed printed Transcript bearing the required cover or title of this certiorari application in this Court, has been served upon this counsel, and Weightstill Woods, who styles himself "Counsel for Petitioners" in this Court, has refused and failed to serve any such completed Transcript on this counsel.

CONCLUSION AS TO STATUS HEREIN OF CERTAIN ALLEGED PARTIES "PETITIONER" AND "RESPONDENT", AND MOTIONS TO STRIKE OR DENY PETITION FOR LACK OF PROPER PARTIES PETITIONER AND RESPONDENT, RESPECTIVELY, AND FOR LACK OF PROPER SERVICE UPON SAID ALLEDGED RESPONDENTS.

Thus, in this purported certiorari application, we have a wholly abortive attempt by counsel for the losing party in both the District and Appeals Court, wholly without authority, or right in law, to realign and make parties "Petitioner" for certiorari in this Court both of the two parties to the record below, who there were opposed to each other, and one of whom (Lake-Dearborn Corporation, this movant) obtained relief against the other; and said counsel then labels as "Respondents" to said certiorari application four other persons, none of whom was a party to, or appeared or participated in the proceedings below, simply because some of said persons were counsel for the party who prevailed in both courts below, and in their capacity as such counsel (but not in the capacity of parties,

or personally) acted in this case on behalf of said party who prevailed in said courts below, namely, Lake-Dearborn Corporation. Said counsel for said alleged "Petitioners" then attempts to overcome the fact that none of said four so-called "Respondents" was a party to the record in this case in either court below, by serving certain notices upon counsel for said Lake-Dearborn Corporation, in which said four persons also have been labelled "Respondents".

Inasmuch as one of said alleged "Petitioners", Lake-Dearborn Corporation, did not grant authority to the counsel who makes this application for certiorari to this Court, and made timely objection thereto, and as said Lake-Dearborn Corporation was opposed to its said alleged fellow "Petitioner", and obtained relief against said "Petitioner" below, said application cannot be entertained or allowed by this Court; and, inasmuch as none of said four so-called "Respondents" to this certiorari application were, or are, parties to the record in this case below, or obtained any relief against either of said alleged "Petitioners" below, the mere labelling of said persons as "Respondents" to this certiorari application is wholly insufficient to, and does not, make them proper parties respondent hereto.

Clearly, the aforesaid action of Weightstill Woods as counsel for said alleged "Petitioners" herein, is improper, utterly without authority in law, and constitutes a wholly insufficient basis for invoking the jurisdiction of this Court to grant a writ of certorari herein. Said application for certiorari herein therefore should be stricken from the files of this Court, or denied, and Lake-Dearborn Corporation so moves this Court, because of a lack of capacity in one of said Petitioners, Lake-Dearborn Corporation, to be a petitioner for certiorari, and because of the lack of authority in counsel for said alleged "Petitioners" herein to designate Lake-Dearborn Corporation as one of said "Pe-

titioners", or to represent said alleged "Petitioner" in such capacity, herein.

And said application for certiorari also should be stricken from the files, or denied, and Lake-Dearborn so moves this Court, because of lack of capacity in any of said four persons who are labelled "Respondents" hereto to be such Respondents, as they were not, and are not, parties to the record in this case below.

And said application also should be stricken, or denied, and Lake-Dearborn Corporation so moves this Court, because no printed Transcript of Record or Petition For Certiorari herein, ever has been properly served upon said alleged "Respondents" hereto, within three (3) months after June 5, 1945, the date on which the final order of said United States Circuit Court of Appeals for the Seventh Circuit, dismissing the appeal of Gilbert Ellithorpe (one of said alleged "Petitioners" herein), was entered.

RESTATEMENT OF THE CASE.

Gilbert S. Ellithorpe, one of the alleged "Petitioners" herein, inadvertently misstates, or fails to state, the following:

The order here appealed from to the United States Circuit Court of Appeals for the Seventh Circuit is a mere interlocutory order denying Ellithorpe's *motion for leave to file* a third-party complaint; *not* an order *dismissing* a third-party complaint (T—68b).

Said Ellithorpe purports (Page 4 of said Petition) to be "President and Director" of Lake-Dearborn Corporation; but in fact on September 17, 1942, he resigned both of said offices (T—30, Par. 6). Ellithorpe now is simply a minority shareholder, one who claims to hold one $100.00 share (T—56) out of $1,156,000 of shares issued (T—3, Par. 2).

This action was commenced on September 17, 1942 (T—2), but the motion for leave to file said third-party complaint was not presented to the court until November 17, 1943 (T—55, exactly *14 months after this action was filed*, and more than *13 months after the defendants had filed their Answer* to Plaintiff's complaint herein (T—29).

In seeking leave to file this third-party complaint, Ellithorpe did not even attempt to comply with the plain requirements of Federal Rule of Civil Procedure 14, which gives the court *discretion* to permit a defendant to tender to a plaintiff additional third party defendants who are alleged to be liable either for all or some part of the plaintiff's claim, or to contribute to or indemnify the original defendants against the plaintiff's claim; *but* Ellithorpe asked leave to file a new and entirely separate and distinct action—a *class action* solely *in his own name* against *Plaintiff's counsel* as such third-party defendants, seeking a money judgment *in his own name* as the representative of such class and against Plaintiff's counsel (T—5667).

As no excuse for the 14 months' delay was offered, and the charges sought to be made in the third-party complaint are with respect to matters which existed at the time of commencement of this action (T—56t-67), and which then were well known to Ellithorpe, the trial court in its discretion denied the motion for leave to file said third-party complaint.

Had Ellithorpe fully and correctly stated the foregoing facts inadvertently omitted from his Brief, it would clearly appear that the Ellithorpes, alone, are responsible for Lake-Dearborn Corporation's continued insolvency and loss of all its assets; and that the Corporation's counsel, the proposed third-party defendants, are in nowise responsible for such insolvency and losses of the Corporation; and that in asking leave to file said third-party complaint, the Ellithorpes were simply attempting to shift the consequences of their

own misconduct upon the shoulders of the counsel who endeavored to save the Corporation in its hour of need.

A full hearing upon Ellithorpe's said motion was had before the District Court. Lengthy motions and briefs were filed in the Circuit Court of Appeals, and a full hearing was had thereon.

Lake-Dearborn Corporation, in the Circuit Court of Appeals, contended that that court was without jurisdiction of Ellithorpe's said appeal, on the ground that the same was taken from a mere interlocutory order which was not a complete and final judgment, and therefore was non-appealable; and also presented a full brief upon the merits.

After consideration of said briefs, and full argument thereon, the Circuit Court of Appeals dismissed Ellithorpe's said appeal.

PROPOSITIONS OF LAW RELIED UPON BY MOVANT, LAKE-DEARBORN CORPORATION.

I.

AN APPLICATION FOR A WRIT OF CERTIORARI MUST BE BROUGHT IN THE NAME OF THE PARTY WHOSE LEGAL RIGHTS HAVE BEEN AFFECTED BY THE JUDGMENT OF THE COURT BELOW, AGAINST THE PARTY WHO OBTAINED SUCH JUDGMENT. A WRIT OF CERTIORARI WILL NOT ISSUE AGAINST ONE WHO IS NOT A PARTY TO THE RECORD, AND WHO DID NOT OBTAIN ANY RELIEF, IN THE COURT BELOW.

Industrial Commissioner of New York v. *Irving Trust Company* (1931) 286 U. S. 543, 52 S. Ct. 496.

II.

AN ORDER ALLOWING OR DENYING A MOTION TO IMPLEAD THIRD PARTIES IS MERELY INTERLOCUTORY AND NOT FINAL, AND HENCE IS NOT APPEALABLE EXCEPT UPON FINAL JUDGMENT. THE INTERLOCUTORY ORDER APPEALED FROM HEREIN, THEREFORE, IS NOT APPEALABLE AT THIS TIME, AS NO FINAL JUDGMENT HAS BEEN RENDERED IN THE DISTRICT COURT. THE APPEAL FROM A MERE INTERLOCUTORY AND NON-APPEALABLE ORDER (DENYING LEAVE TO FILE A THIRD-PARTY COMPLAINT) NECESSARILY HAS TO BE DISMISSED FOR WANT OF JURISDICTION IN THE CIRCUIT COURT OF APPEALS TO REVIEW THE SAME.

Moore's Federal Practice, Vol. I, Sec. 14.02, Note 1a, Page 741 (and page 741, Note 1, of 1944 Pocket Parts, citing 4 additional recent decisions); 14.03, second paragraph on page 749, Note 35a, of 1944 Pocket Parts); (and page 749, Note 35a, of 1944 Pocket Parts and 14.06, Notes 10-12, Pages 768-9, and cases cited.

Allen Calculators v. *National Cash Register Co.*, (1944) 322 U. S. 905; 64 S. Ct. 905 (5-7) (9 pp.

General Taxicab Ass'n, Inc. v. *O'Shea*, (A D. C. 1940) 109 F. (2d) 671).

Van Cott v. *Marion DeVries, Inc.*, (C. C. A. N Y. 1930) 37 F. 2d 48 (2).

Blaffer v. *New Orleans Water Supply Co.*, (C.C. A. La. 1908) 160 F. 389 (2d) and at 391.

Pennsylvania Co. for Insurances, Etc. v. *Dec* ert. (1941) (C. C. A. 3) 123 F. 2d 979 (7).

Pueblo DeTaos v. *Archuleta*, (C. C. A. 10 1933) 64 F. 2d 807 (10-11).

III.

A PETITION FOR THE WRIT OF CERTIORARI WILL BE DENIED, IF THE JUDGMENT BELOW IS NOT A COMPLETE, FINAL AND APPEALABLE JUDGMENT.

Cleveland C. C. & St. L. Ry. Co. v. *Henry* (1933) 290 U. S. 672, 54 S. Ct. 70(8), citing authorities.

IV.

(A) THE ACTION OF THE DISTRICT COURT IN DENYING THE MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT IS DISCRETIONARY. THE COURT'S DISCRETION WAS PROPERLY EXERCISED AGAINST THE ALLOWANCE OF SAID MOTION. THE PROPOSED THIRD-PARTY COMPLAINT INVOLVES A NEW, SEPARATE AND DISTINCT CONTROVERSY BETWEEN DIFFERENT PARTIES, WHICH INVOLVES NEW LAW AND WOULD REQUIRE DIFFERENT EVIDENCE TO SUSTAIN NEW ISSUES, AND WOULD HAVE BURDENED THE COURT AND DELAYED AND HINDERED PLAINTIFF IN THE PROSECUTION OF ITS COMPLAINT. IT WOULD HAVE BEEN AN ABUSE OF DISCRETION TO PERMIT SAID PROPOSED THIRD-PARTY COMPLAINT TO BE FILED HEREIN, 14 MONTHS AFTER THE COMMENCEMENT OF THIS SUIT, AND 13 MONTHS AFTER ISSUE JOINED ON PLAINTIFF'S COMPLAINT.

Moore's Federal Practice, Vol. 1, Sec. 14.02, Note 1a, Page 741 (and page 741, Note 1, of 1944 Pocket Parts, citing 4 additional recent decisions); 14.03, second paragraph on page 749c (and page 749, Note 35a, of 1944 Pocket Parts); and 14.06, Notes 10-12 Pages 768-9, and cases cited.

General Taxicab Ass'n, Inc. v. *O'Shea*, (App. D. C. 1940) 109 F. 2d 671.

Roadway Express v. *Automobile Insurance Co.*, (1945) 8 Federal Rules Service 14a.513, Case 3, citing authorities.

Skeler v. *Detroit*, (1939) 30 F. Supp. 643.

Saba v. *Katz*, (1944) 55 F. Supp. 1000 (1-3).

United States v. *Jollimore*, (1941) 2 Federal Rules Decisions 148.

United States v. *Hogansburg Milk Co.*, (1944) 8 Federal Rules Service, 14a.11, Case 4.

(B) THE PARTIES TO THE PROPOSED THIRD-PARTY COMPLAINT, NAMELY, THE ORIGINAL DEFENDANTS AND PLAINTIFF'S COUNSEL, ALL ARE RESIDENTS AND CITIZENS OF ILLINOIS. THIS THIRD-PARTY COMPLAINT ALLEGES A NEW, SEPARATE AND DISTINCT CONTROVERSY BETWEEN SUCH PARTIES. THE THIRD-PARTY COMPLAINT THEREFORE IS NOT AN ANCILLARY PROCEEDING, AND THE LACK OF DIVERSITY OF CITIZENSHIP BETWEEN SUCH PARTIES WOULD HAVE OUSTED THE DISTRICT COURT OF ITS JURISDICTION THEREOVER. LEAVE TO FILE SAID THIRD-PARTY COMPLAINT THEREFORE WAS PROPERLY DENIED.

Saba v. *Katz*, (1944) 55 F. Supp. 1000 (1-3).

United States v. *Hogansburg Milk Co.*, (1944) 8 Federal Rules Service, 14a.11, Case 4.

V.

NEITHER THE DENIAL OF A MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT, NOR A DISMISSAL OF A THIRD-PARTY COMPLAINT, "WITH PREJUDICE", IS A FINAL ADJUDICATION, WHERE THE THIRD-PARTY DEFENDANTS HAVE NOT BEEN SERVED WITH PROCESS.

Pueblo DeTaos v. *Archuleta* (C. C. A. 10 1933) 64 64 F. 2d 807 (10-11).

ARGUMENT.

I.

AN APPLICATION FOR A WRIT OF CERTIORARI MUST BE BROUGHT IN THE NAME OF THE PARTY WHOSE LEGAL RIGHTS HAVE BEEN AFFECTED BY THE JUDGMENT OF THE COURT BELOW, AGAINST THE PARTY WHO OBTAINED SUCH JUDGMENT. A WRIT OF CERTIORARI WILL NOT ISSUE AGAINST ONE WHO IS NOT A PARTY TO THE RECORD, AND WHO DID NOT OBTAIN ANY RELIEF, IN THE COURT BELOW.

In the case of *Industrial Commissioner of New York* v. *Irving Trust Company* (1931) 286 U.S. 543, 52 S. Ct. 496, certiorari was denied for a defect of parties petitioner. This Court gave as its reason for its order denying certiorari, that "The *claimants not being parties to the application for the writs* and it *not appearing* that *petitioner has capacity to prosecute the application*", the petitioner lacked the necessary interest required to give him the capacity to obtain the writ.

II.

AN ORDER ALLOWING OR DENYING A MOTION TO IMPLEAD THIRD PARTIES IS MERELY INTERLOCUTORY AND NOT FINAL, AND HENCE IS NOT APPEALABLE EXCEPT UPON FINAL JUDGMENT. THE INTERLOCUTORY ORDER APPEALED FROM HEREIN, THEREFORE, IS NOT APPEALABLE AT THIS TIME, AS NO FINAL JUDGMENT HAS BEEN RENDERED IN THE DISTRICT COURT. THE APPEAL FROM A MERE INTERLOCUTORY AND NON-APPEALABLE ORDER (DENYING LEAVE TO FILE A THIRD-PARTY COMPLAINT) NECESSARILY HAD TO BE DISMISSED FOR WANT OF JURISDICTION IN THE CIRCUIT COURT OF APPEALS TO REVIEW THE SAME.

The Order entered November 22, 1943, and sought to be appealed from by notice of appeal filed February 14, 1944, is:

"Defendants' Motion for leave to file Third Party Complaint is argued and dismissed with prejudice."

We ask this Court to consider its very decision in *Allen Calculator, Inc.* v. *National Cash Register Co.* (1944) 322 U. S. 905; 64 S. St. 905 (5-7) (9), in which an order denying a petition for leave to intervene was appealed from.

Mr. Justice Roberts stated that in such instances (in syllabus 3):

> "The court shall consider whether intervention will unduly delay or prejudice the rights of the original parties"; and (in syllabus 5) "*The challenged order* (denying leave to intervene) is *but an order* in the cause and *not* the *final judgment.*" (Emphasis ours.)

Mr. Justice Roberts then said:

> "It was, *inter alia*, to prevent the delay of unwarranted appeals by disappointed applicants to intervene, which would suspend the ultimate disposition of suits * * *, that the statute limited the right to appeal to *final* decrees. * * * The appeal is dismissed" (Emphasis ours.)

It also is noteworthy that Professor Moore's statement in the text of *Moore's Federal Practice*, Vol. 1, at page 749, has been quoted with approval and followed in several recent decisions, as shown by the text annotation to page 749 of his 1944 Pocket Part to Volume I.

We quote (page 749):

> "Where the defendant's motion to implead a third-party is denied, *the order would not be appealable*, since Rule 14 places the grant or denial of such a motion *in the discretion* of the court. Even if an abuse of discretion could conceivably be shown, still *the order denying impleader would not be appealable, inasmuch as it does not finally dispose of any right of the defendant. If the defendant's motion to implead a third-party was granted* over the plaintiff's objection,

> the *plaintiff could not appeal from* such an order, since *it is not a final order* in any sense." Citing authorities. (Emphasis ours.)

And see the recent decisions cited under Page 741, Note 1, of said 1944 Pocket Part, upholding the text statement:

> "Whether a party to an action shall be allowed to implead an additional party rests *in the discretion* of the court."

In order to save space and printing costs, we have not repeated herein our argument made in support of our said Motion To Dismiss filed in the Circuit Court of Appeals on April 22, 1944 (T—74). We have listed all the cases cited therein under this Point of this Brief. *We respectfully refer this Court to our said Motion* filed in said Appeals Court, to *Apellants' Response* thereto, *and* to *our Reply* to said Response (T—74-96), wherein the issues upon said Motion to dismiss are more fully discussed.

We respectfully submit that said order sought to be appealed from is a mere interlocutory order, not final in its nature, and not appealable; and that the appeal therefore necessarily had to be dismissed for want of jurisdiction in the Appeals Court to review said order.

III.

A PETITION FOR THE WRIT OF CERTIORARI WILL BE DENIED, IF THE JUDGMENT BELOW IS NOT A COMPLETE, FINAL AND APPEALABLE JUDGMENT.

In *Cleveland C. C. & St. L. Ry. Co.* v. *Henry* (1933) 290 U. S. 672, 54 S. Ct. 70(8), the petition for a writ of certiorari to the Supreme Court of Missouri was "denied for want of a final judgment." This Court cited a number of authorities in support of its said action.

Since we have clearly demonstrated in our argument under our Point II that the judgment sought to be appealed to the Circuit Court of Appeals is merely interlocutory and not final, and therefore not appealable, it is clear that this petition for certiorari must be denied by this Court.

IV.

(A) THE ACTION OF THE DISTRICT COURT IN DENYING THE MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT IS DISCRETIONARY. THE COURT'S DISCRETION WAS PROPERLY EXERCISED AGAINST THE ALLOWANCE OF SAID MOTION. THE PROPOSED THIRD-PARTY COMPLAINT INVOLVES A NEW, SEPARATE AND DISTINCT CONTROVERSY BETWEEN DIFFERENT PARTIES, WHICH INVOLVES NEW LAW AND WOULD REQUIRE DIFFERENT EVIDENCE TO SUSTAIN NEW ISSUES, AND WOULD HAVE BURDENED THE COURT AND DELAYED AND HINDERED PLAINTIFF IN THE PROSECUTION OF ITS COMPLAINT. IT WOULD HAVE BEEN AN ABUSE OF DISCRETION TO PERMIT SAID PROPOSED THIRD-PARTY COMPLAINT TO BE FILED HEREIN, 14 MONTHS AFTER THE COMMENCEMENT OF THIS SUIT, AND 13 MONTHS AFTER ISSUE JOINED ON PLAINTIFF'S COMPLAINT.

The trial judge had numerous and adequate reasons for denying the Defendants' Motion for leave to file a Third-party Complaint against Plaintiff's counsel in this case. They are:

(1) Allowance or Denial of a Motion for Leave to File a Third-Party Complaint Is Discretionary With the Court.

Moore's Federal Practice, Vol. I, Sec. 14.02, Note 1a, Page 741 (and page 741, Note 1, of 1944 Pocket Parts, citing 4 additional recent decisions); 14.03, second paragraph on page 749c (and page 749, Note 35a of 1944 Pocket Parts); and 14.06, Notes 10-12, Pages 768-9, and cases cited.

General Taxicab Ass'n, Inc. v. *O'Shea*, (App. D.C. 1940) 109 F. (2d) 671.

(2) **Defendants Delayed 14 Months After This Suit Was Commenced, and 13 Months After the Original Complaint in This Case Was at Issue, Before Asking Leave to File the Third-Party Complaint. Said Defendants Therefore Clearly Were Guilty of Laches, Especially as They Made No Explanation for This Long Delay.**

(3) **The Purported Claim Attempted to Be Stated in Said Third-Party Complaint Is a New and Separate Controversy, Against Different Parties, With New Issues and Under New Law, and Would Require Different Evidence of Separate Transactions Occurring at Times Different from Those Set Forth in the Original Pleadings. Thus, to Permit the Injection of This New and Separate Controversy Would Be a Plain Violation of the Requirements of Rule 14a.**

Saba v. *Katz,* (1944) 55 F. Supp. 1000 (1-3).
United States v. *Jollimore,* (1941) 2 Federal Rules Decisions 148.

We point out that Ellithorpe admits (page 40 of Petitioner's Brief) that "The issues tendered by the third-party complaint * * * are * * * *additional issues.*"

(4) **During the 14 Months Which Elapsed Between the Commencement of This Suit, and the Time When Said Defendants Asked Leave to File a Third-Party Complaint, 3 of the 5 Counsel for Plaintiff Sought to Be Made Third-Party Defendants Left the Jurisdiction of the Court and Went Into the Service of Their Government.**

(5) **The Proposed Third-Party Complaint Failed to Comply With Federal Rule of Civil Procedure 23B, in Each of the Following Respects:**

(a) It Was Not Signed (T—67c).
(b) It Was Not Sworn To (T—67b).
(c) It Did Not Show That the Third-party Plaintiff

Was a Shareholder of Record at the Time of the Transaction of Which He Complains, or That His Share Thereafter Devolved on Him by Operation of Law (T—56-67), Except by Way of Mere Conclusions (T—56c). Without Any Issuable Facts Being Pleaded to Support Such Conclusions.

(d) It Did Not Show That the Action Was Not a Collusive One to Confer Jurisdiction on the Court (T—56-67).

(e) It Failed to Set Forth Any Efforts of the Third-party Plaintiff to Secure From the Managing Directors, or the Shareholders, Such Action as Third-party Plaintiff Desired, or Any Reasons For His Failure to Obtain Such Action, or For Not Making Such effort (T—56-67).

The Petitioner cannot claim that he did not comply with Rule 23b because of the preliminary injunction obtained by Plaintiff, as by the express terms of that injunction he at any time could have asked the court for permission to do anything which was prohibited by the injunction. The injunction was not appealed from, and no such permission ever was asked.

(6) Plaintiff Refused to Assert a Claim Against Its Counsel, the Proposed Third-Party Defendants, and Plaintiff Cannot Be Compelled to Proceed Against Said Third-Parties Defendant.

Roadway Express v. *Automobile Insurance Co.*, (1945) 8 Federal Rules Service 14a.513, Case 3, citing authorities.

(7) There Is No Diversity of Citizenship Between the Third-Party Plaintiff, Ellithorpe, and the Third-Party Defendants, Plaintiff's Counsel, as They All Are Residents and Citizens of the State of Illinois. As the Claim Asserted in the Third-Party Complaint Was a Separate and Independent Controversy from That Alleged in the Original Complaint, This Lack of Diversity Would Have Ousted the District Court of Jurisdiction.

United States v. *Hogansburg Milk Co.*, (1944) 8 Federal Rules Service, 14a.11, Case 4.
Saba v. *Katz*, (1944) 55 F. Supp. 1000 (1-3).

(8) The Allowance of the Motion for Leave to File the Third-Party Complaint Would Complicate the Issues, Hinder and Delay the Plaintiff, Require the Plaintiff to Obtain Different Counsel at Large Expense, and Delay the Trial.

(9) The Trial Judge Unquestionably Doubted the Defendants' Good Faith in Seeking to File a Third-Party Complaint Against Plaintiff's Counsel, as the Defendants Waited 14 Months Before Asking Leave to Do So, and Meanwhile Unlawfully Withheld Plaintiff's Evidence Against Them Consisting of Plaintiff's Corporate Charter, Minutes, and Books and Records for More Than a Year, and Now (Over 2½ Years Later) Still Withholds the Same, in Wilful Violation of an Order of the Trial Court to Restore Said Property to Plaintiff.

(10) It unquestionably Appeared to the Trial Court That Defendants' Only Reason for Asking Leave to File the Third-Party Complaint Was to Becloud and confuse the Issues, to Hinder and Delay the Plaintiff, and to Shift the Blame for Their Misconduct Onto the Shoulders of Plaintiff's Counsel.

(11) Rule 14 Should Not Be Permitted to Be Juggled Around to Permit a Defendant to Make a Tricky and Dishonest Defense by Bringing Into the Federal Court Parties Who Should Be Sued in a State Court, If At All.

Ikeler v. *Detroit*, (1939) 30 F. Supp. 643.

We respectfully submit that it would have been an abuse of discretion by the trial court to grant Ellithorpe leave to file the Third-party Complaint, under the facts and circumstances above set forth.

(B) THE PARTIES TO THE PROPOSED THIRD-PARTY COMPLAINT, NAMELY, THE ORIGINAL DEFENDANTS AND PLAINTIFF'S COUNSEL, ALL ARE RESIDENTS AND CITIZENS OF ILLINOIS. THE THIRD-PARTY COMPLAINT ALLEGES A NEW, SEPARATE AND DISTINCT CONTROVERSY BETWEEN SUCH PARTIES. THE THIRD-PARTY COMPLAINT THEREFORE IS NOT AN ANCILLARY PROCEEDING, AND THE LACK OF DIVERSITY OF CITIZENSHIP BETWEEN SUCH PARTIES WOULD HAVE OUSTED THE DISTRICT COURT OF ITS JURISDICTION THEREOVER. LEAVE TO FILE SAID THIRD-PARTY COMPLAINT THEREFORE WAS PROPERLY DENIED.

It is apparent that the alleged cause of action against Plaintiff's counsel set forth in the proposed Third-party Complaint is independent of the original action; is based on different facts and calls for unrelated proof of a different character from that in the primary action. It is not an ancillary proceeding and as diversity of citizenship is lacking between the Third-party Plaintiff and the Third-party Defendants, the court was without jurisdiction. The motion for leave to file the Third-party Complaint necessarily had to be denied, as to grant the motion would oust the trial court of jurisdiction.

Saba v. *Katz*, (1944) 55 F. Supp. 1000 (1-3).
United States v. *Hogansburg Milk Co.*, (1944) 8 Federal Rules Service, 14a.11, Case 4.

V.

NEITHER THE DENIAL OF A MOTION FOR LEAVE TO FILE A THIRD-PARTY COMPLAINT, NOR A DISMISSAL OF A THIRD-PARTY COMPLAINT, "WITH PREJUDICE", IS A FINAL ADJUDICATION, WHERE THE THIRD-PARTY DEFENDANTS HAVE NOT BEEN SERVED WITH PROCESS.

In *Pueblo DeTaos* v. Archuleta (CCA10 1933) 64 F. 2d 807(10-11), the Tenth Circuit Court of Appeals rendered a particularly well reasoned decision which is clearly applicable to the factual situation here. The District Court dismissed the suit for want of prosecution "with prejudice", because there had been no service upon the defendants after the suit had been pending more than a year. The trial judge refused to strike out the words "with prejudice" from the dismissal order.

We quote from the opinion:

> "(10, 11) An inspection of the order of dismissal, pleaded in bar, discloses that the action was dismissed for want of prosecution. That being true, nothing was determined as to the right of the parties to the litigation, and the dismissal is not a bar to a subsequent suit. *The addition of the words "with prejudice" cannot change the facts. A dismissal with prejudice implies a decision on the merits,* either after an adjudication of right or pursuant to an agreement of the parties. (Citing authorities.) *There could be no such adjudication between the parties in this case, for the defendants, not being in court, could not be concluded by such adjudication.* There is no contention that the dismissal was pursuant to a settlement of the case." (Emphasis added).

Therefore it is clear that Ellithorpe has not in any way been harmed by the addition of the words "with prejudice" to the order denying his motion for leave to file a third-party complaint.

CONCLUSION.

Relief is sought in an improper manner, by attempting to force Lake-Dearborn Corporation, in effect, to ask for a writ of certiorari to review and reverse an order entered in its favor below, without the authority and over the objections of said Corporation. Said relief is sought against parties labelled "Respondents", who are not parties to the record in this case, and who obtained no relief herein. The application for certiorari herein should be stricken from the files of this Court, or denied, because of the lack of authority of Ellithorpe's counsel to petition for the writ in the name of Lake-Dearborn Corporation, and because of a lack of capacity in said Corporation to be an applicant for said writ.

Said application also should be stricken, or denied, because of a lack of capacity in any of the so-called "Respondents" to be such, as they are not parties to the record in this case; and also should be stricken, or denied, because no printed Transcript of Record or Petition for certiorari was properly served upon said alleged "Respondents", within three months after the date on which the final order of said United States Circuit Court of Appeals for the Seventh Circuit, was entered.

The District Court properly exercised its discretion, and for it to have allowed Ellithorpe's motion to implead third-parties defendant would have been an abuse of discretion under the facts shown. The decision of both Courts below on the merits is obviously correct, involves no substantial question, and is not in conflict with any other decision. No important question of law is involved.

No grounds have been shown justifying the granting of a writ of certiorari herein, and said Petition therefor should be denied.

Respectfully submitted,

CHARLES RALPH JOHNSTON
Counsel for Lake-Dearborn Corporation
11 South La Salle Street—835
Chicago 3, Illinois

CHARLES RALPH JOHNSTON and

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Of Counsel